

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

AMGEN INC.,)	
)	
Plaintiff,)	
)	Civil Action No.: 05 Civ. 12237 WGY
v.)	
)	
F. HOFFMANN-LA ROCHE LTD, a)	
Swiss Company, ROCHE DIAGNOSTICS)	
GmbH, a German Company, and)	
HOFFMANN LA ROCHE INC., a New)	
Jersey Corporation,)	
)	
Defendants.)	

**MEMORANDUM IN SUPPORT OF AMGEN’S RENEWED MOTION FOR AN EXTENSION OF TIME
TO SERVE ITS EXPERTS’ REPORTS REGARDING TESTING OF ROCHE’S LATE-PRODUCED
CELL LINE**

Amgen respectfully renews its request that the Court grant an extension of time for Amgen to supplement its expert reports to address experiments measuring the EPO production levels of the recently received DN2-3a3 cells. As was discussed in Amgen's motion papers¹ that led to this Court's Order of January 23, 2007 compelling Roche to produce its cell line, the testing of Roche's cell line is the most direct evidence of Roche's infringement of the claims of the '349 patent.

Amgen originally sought production of Roche's cell line in its First Set of Requests for Documents and Things served on October 30, 2006. Following Roche's refusal to comply and a month of fruitless negotiations, Amgen filed a motion to compel on January 10, 2007. On January 23, 2007, the Court granted that motion to compel, and ordered Roche to produce its cell line.² One month later, Roche had still not complied with the Court's Order, despite Amgen's repeated requests that Roche comply with the Court's Order, and despite Amgen's further attempts to reach a compromise solution. Consequently, on February 23, 2007, Amgen filed a motion to enforce the Court's January 23, 2007 Order.³ Amgen explained that Roche had already deprived it of the necessary time to grow and investigate Roche's cells, and therefore requested (in addition to enforcement of the Court's earlier Order) an extension of time to submit

¹ Docket Nos. 222 & 223, Plaintiff Amgen Inc.'s Motion To Compel Production Of Roche's Cell Lines & Memorandum in Support.

² See Order dated January 23, 2007.

³ Docket Nos. 293 & 294 ("Amgen Inc.'s Motion To Enforce The Court's January 23, 2007 Order Compelling Roche To Produce Its Cell Line And To Extend The Time For Amgen To Submit Its Infringement Expert Report Regarding The Testing Of Roche's Dn2-3(A)3 Cell Line & Memorandum In Support.").

expert reports addressing experiments performed with Roche's DN2-3a3 cells.⁴ The Court terminated Amgen's motion to enforce (as well as Roche's cross-motion to compel Amgen to produce its own cell lines) on February 27, 2007, and ordered the parties to produce their respective cell lines within thirty days.⁵

Finally, after more than four months of Amgen's attempts to reach a compromise with Roche, and after Amgen had to resort to two motions to compel the production of the cells, Roche produced a single sample⁶ of its cell line to Amgen on March 21, 2007 -- a little over two weeks before the deadline for the parties to submit initial expert reports. Moreover, Roche did not provide its recommended instructions (i.e., culture medium formulations and culture conditions) for the growth of its cell line until March 23, 2007, after Amgen had to request them.

Roche's unjustified delay in producing its cells left Amgen's experts with less than two weeks to complete their work before the April 6 deadline for submission of opening expert reports – less than two weeks to acquire the necessary media components, grow the cells to the necessary stage, collect the culture medium from those cells, test that culture medium in a radioimmunoassay procedure, tabulate the results, and prepare expert reports based on those results. Indeed, Roche's suggested culture media formulation requires the addition of dozens of additional components to the standard base media, which are not readily available.

⁴ Docket No. 294, at 3 (“Additionally, since Roche's unjustified delay of production has deprived Amgen of virtually all of the time originally allotted for expert discovery on this issue, Amgen respectfully requests that the Court allow Amgen two additional weeks to complete its infringement expert report.”) and 8-9 (“Amgen respectfully requests that the Court . . . grant Amgen two additional weeks (until April 20, 2007) to submit its infringement expert report regarding the testing of Roche's DN2-3(a)3 cell line”).

⁵ Docket No. 298 (“Modified Order Regarding Production of the Parties' Cell Lines And Applicable Restrictions of Use.”).

⁶ Despite Amgen's reasonable request for two individual samples, Roche produced only one sample, without explanation.

Because there has not been sufficient time for Amgen's experts to even collect the materials to allow them to grow Roche's cells, it obviously has been impossible for those experts to run experiments with these cells including, for example, radioimmunoassays to determine whether the cells produce EPO at the rate specified by the claims of the '349 patent, or to prepare expert reports based on data generated from experiments. By delaying the production of its cells to Amgen for several months, Roche has effectively deprived Amgen's experts of the time needed to complete the investigation of Roche's cells prior to the deadline for submission of initial expert reports. Amgen therefore respectfully renews its request that the Court permit Amgen to serve supplementation to its expert reports to address any experiments or experimental data generated from these DN2-3a3 cells after April 6.

In its February 23, 2007 motion to enforce this Court's order compelling Roche to produce its cells, Amgen requested an extension of time to April 20 to serve its expert reports on this issue. Due to the further delay in obtaining Roche's cells and preparing Roche's suggested media in which those cells could be grown, that original requested extension to April 20 is now insufficient.

For these reasons, Amgen respectfully requests that the Court:

(a) grant an extension of time of two months through June 6, 2007 for Amgen to serve its Fed. R. Civ. P. 26(a)(2)(B) expert reports on the experiments measuring the EPO production levels of Roche's DN2-3a3 cells; and

(b) grant any other relief which the Court deems appropriate and just.

DATED: April 6, 2007

Of Counsel:

Stuart L. Watt
Wendy A. Whiteford
Monique L. Cordray
Darrell G. Dotson
Kimberlin L. Morley
Erica S. Olson
AMGEN INC.
One Amgen Center Drive
Thousand Oaks, CA 91320-1789
(805) 447-5000

Respectfully Submitted,

AMGEN INC.,

/s/ Michael R. Gottfried
D. Dennis Allegretti (BBO# 545511)
Michael R. Gottfried (BBO# 542156)
Patricia R. Rich (BBO# 640578)
DUANE MORRIS LLP
470 Atlantic Avenue, Suite 500
Boston, MA 02210
Telephone: (857) 488-4200
Facsimile: (857) 488-4201

Lloyd R. Day, Jr. (*pro hac vice*)
DAY CASEBEER MADRID & BATCHELDER LLP
20300 Stevens Creek Boulevard, Suite 400
Cupertino, CA 95014
Telephone: (408) 873-0110
Facsimile: (408) 873-0220

William G. Gaede III (*pro hac vice*)
McDERMOTT WILL & EMERY
3150 Porter Drive
Palo Alto, CA 94304
Telephone: (650) 813-5000
Facsimile: (650) 813-5100

Kevin M. Flowers (*pro hac vice*)
MARSHALL, GERSTEIN & BORUN LLP
233 South Wacker Drive
6300 Sears Tower
Chicago, IL 60606
Telephone: (312) 474-6300
Facsimile: (312) 474-0448

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/s/ Michael R. Gottfried
Michael R. Gottfried